IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1646

ALAN JONES and CRAIG LEE McCRACKEN,
Petitioners,

VERSUS

FARMERS ALLIANCE MUTUAL INSURANCE COMPANY, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May, 1978

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Alan Jones and Craig Lee McCracken, the petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered in the above entitled case on February 22, 1978.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit is printed in Appendix A hereto, infra page 1a. The judgment of the United States Court of Appeals for the Tenth Circuit is printed in

Appendix A hereto, infra page 12a. The Journal Entry of Judgment of the United States District Court for the Western District of Oklahoma is printed in Appendix A hereto, page 13a.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Tenth Circuit (Appendix A, infra, page 12a) was entered on February 22, 1978. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. That the Federal District Court sitting in the State of Oklahoma in exercising jurisdiction by reason of 28 U.S.C. § 1332 does not have jurisdiction to hear an action brought under 28 U.S.C. § 2201, Federal Declaratory Judgment Act, when the maintenance of such an action is substantively barred in the state courts of the State of Oklahoma by reason of 12 Oklahoma Statutes § 1651, Declaratory Judgment Act.

2. That an actual controversy did not exist as required by U.S.C. § 2201 between the insurer, Farmers Alliance Mutual Insurance Company, and the insured, Spann Chevrolet Company, Orval Spann, Sally Ann Shippey, Administratrix of the Estate of E. L. Shippey, and Melissa Spann, and they should have been re-aligned as parties plaintiffs, thus destroying diversity of citizenship required by 28 U.S.C. § 1332.

3. That the court erred in granting Motion for Summary Judgment in view of the affidavits submitted by Alan Jones and Craig Lee McCracken, which showed a course of conduct by the officers of Spann Chevrolet

Company which gave rise to implied permission and, therefore, was a question of material fact to be heard by a trier of fact.

STATUTES INVOLVED

The statutes involved are 28 U.S.C. § 1332, 28 U.S.C. § 2201 and 12 O.S. § 1651 which are set out verbatim and printed in Appendix B hereto.

STATEMENT OF THE CASE

On August 1, 1975, Farmers Alliance Mutual Insurance Company, a Kansas corporation, issued its policy of insurance No. CC306729, designated "General-Automobile Liability Policy" to Spann Chevrolet Company, an Oklahoma corporation. The policy period was from August 1, 1975, to August 1, 1976.

On or about the 20th day of May, 1976, E. L. Shippey, deceased, Alan Jones, Craig Lee McCracken and Melissa Spann were riding in a passenger automobile, a 1975 Camaro, being driven by E. L. Shippey, deceased, on State Highway 61 near the city of Fittstown, County of Pontotoc, State of Oklahoma. The automobile left the highway injuring Alan Jones, Craig Lee McCracken and Melissa Spann, and causing the death of E. L. Shippey, deceased.

The aforementioned automobile was owned by Spann Chevrolet Company and had been furnished to Melissa Spann for her use and benefit by Orval Spann, Vice President and Treasurer of Spann Chevrolet Company.

On January 12, 1977, Alan Jones filed a tort action for damages in the District Court of Pontotoc County, State of Oklahoma, numbered C-77-8, against Sally Ann Shippey, Administratrix of the Estate of E. L. Shippey, deceased,

alleging injuries as a result of the negligence of E. L. Shippey, deceased, driver of the automobile. On February 4, 1977, Craig Lee McCracken filed a similar action. On February 4, 1977, Farmers Alliance Mutual Insurance Company filed an action under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, against Spann Chevrolet Company, Orval Spann and Sally Ann Shippey, Administratrix of the Estate of E. L. Shippey, deceased, Alan Jones, Craig Lee McCracken and Melissa Spann. All the named defendants were citizens of the State of Oklahoma, and the matter in controversy was alleged to exceed the sum of Ten Thousand dollars ($10,000.00), exclusive of interest and attorney's fee and costs, thus allegedly giving the District Court jurisdiction by virtue of 28 U.S.C. § 1332. Defendants filed their answer therein and Alan Jones denied jurisdiction of the court to hear the action. Discovery was commenced by parties. During the course of the discovery proceedings, Spann Chevrolet Company, through its officers, Orval Spann, Vice President and Treasurer, and Wanda Charlene Spann, a/k/a Wanda C. Spann, Secretary, alleged that E. L. Shippey, deceased, was operating a motor vehicle owned by Spann Chevrolet Company and furnished to Melissa Spann in direct derogation of instructions given to Melissa Spann regarding the operation of the motor vehicle by third persons. E. L. Shippey, deceased, was operating the motor vehicle at the time of the accident with permission from Melissa Spann. Alan Jones and Craig Lee McCracken thereafter filed affidavits alleging that at times prior to the date of the accident, a course of conduct was pursued by Wanda Charlene Spann, a/k/a Wanda C. Spann, in knowing of and allowing third persons to operate for

Melissa Spann's use the motor vehicle furnished to Melissa Spann, and that no objections were raised by Wanda C. Spann thereto.

Farmers Alliance Mutual Insurance Company filed a Motion for Summary Judgment and Alan Jones and Craig Lee McCracken filed a Motion to Dismiss for lack of jurisdiction. Briefs were filed, oral argument was had in which the issues of jurisdiction, actual controversy, re-alignment and implied permission were addressed. On August 12, 1977, Farmers Alliance Mutual Insurance Company's Motion for Summary Judgment was granted and entered on the judgment docket on August 25, 1977.

The court in entering judgment for Farmers Alliance Mutual Insurance Company determined that there was no genuine issue to any material fact, that E. L. Shippey, deceased, was operating the motor vehicle without the expressed permission of any named insured, that there was no implied permission, that E. L. Shippey, deceased, was not insured under the terms of Farmers Alliance Mutual Insurance Company's policy, that the company was not obligated to defend actions brought against his estate arising out of injuries allegedly sustained by reason of the accident in order to pay any judgments rendered as a result thereof, and, therefore, Farmers Alliance Mutual Insurance Company was entitled to judgment in its favor as a matter of law.

Pursuant to 28 U.S.C. § 1291, Alan Jones and Craig Lee McCracken on September 6, 1977, filed notice of appeal as per Rule 56 of the Federal Rules of Civil Procedure and filed their bond for the cost.

The Court of Appeals in affirming the decision of the

District Court determined that the Federal Declaratory Judgment Act involved strictly procedural remedies and not substantive rights, thus not applying the twin aims of *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), namely, "discouragement of forum shopping and avoidance of inequitable administration." The Court of Appeals further found that the District Court's refusal to re-align the defendants, Spann Chevrolet Company, and Orval Spann was proper and that the District Court correctly granted summary judgment in favor of the respondents, Farmers Alliance Mutual Insurance Company, holding there was no genuine issue as to any material fact.

REASONS FOR GRANTING THIS WRIT

This Writ should be allowed for the reason that the opinion delivered by the Circuit Court of Appeals in this case is in conflict with the decision of at least one other Court of Appeals on two of the issues presented by the case. This falls within the character of reasons which the United States Supreme Court will consider as set out in Rule 19 of the United States Supreme Court Rules. In discussing possible reasons to allow Writ of Certiorari, Section 1b of Rule 19 reads:

> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter;***"

In considering the issue of whether a District Court acted properly in exercising jurisdiction by way of 28 U.S.C. § 2201, the Federal Declaratory Judgment Act, the United States Circuit Court of Appeals for the Seventh Circuit in *Allstate Insurance Company v. Charneski,* 286 F.2d 238 (C.A. 7 1960), reached a conclusion directly

opposite that reached by the Tenth Circuit in this case. By analogy, it can be concluded that the court in the Seventh Circuit would not have heard the present plaintiff's complaint. The real issue before the Court in the present case is whether a Kansas corporation can accomplish in the Federal forum what has been expressly denied in the state forum to citizens of all states, including the state of Oklahoma. *Charneski,* supra, says no, by analogy, when resort is had to the federal courts and jurisdiction is invoked by reason of diversity and amount under 28 U.S.C. § 1332. The Tenth Circuit in the present case allowed the appellee herein to accomplish in Federal Court what would have been denied in Oklahoma state courts and the United States Circuit Court of Appeals for the Fourth Circuit.

The decision of the Court of Appeals in this case concerning the re-alignment of the parties is also in conflict with the Court of Appeals of another circuit. The United States Court of Appeals for the Fourth Circuit dealt with contractural obligations under an insurance policy exactly the same as those dealt with in the present case. In *Fireman's Fund Insurance Company v. C. K. Dunlap,* 317 F.2d 443 (C.A. 4 1963), as in this case, the insurer and insured agreed that a vehicle was being operated without the expressed permission of the named insured. The Fourth Circuit in the *Fireman's Fund* case held that the agreement as to the permission destroyed the only actual controversy that existed. The Fourth Circuit further determined that the insurer's allegation of a controversy between itself and its insured because of the insurer's duty to defend the law suit was only nominal and without merit due to the expressed terms of the contract itself. The Fourt Circuit had

previously reached a similar conclusion in *American Fidelity & Casualty Company v. The Service Oil Company,* 164 F.2d 478 (C.A. 4 1947).

Petitioners here further contend that the Writ should be allowed for the reason that the granting of the summary judgment by the District Court was improper and that the U.S. Circuit Court of Appeals for the Tenth Circuit was in error when it affirmed the action of the District Court in granting summary judgment. The real issue presented by the petitioners here was not examined by either the District Court or Circuit Court. Petitioners allege in essence that the course of conduct of Wanda C. Spann which was pursued with knowledge of the facts was such that it signified clearly and convincingly consent to the conduct of her daughter, Melissa Spann, in allowing third parties to drive the automobile given to Melissa Spann for her use. This alleged conduct on the part of Wanda C. Spann demonstrated her implied consent to the action of Melissa Spann in allowing third parties in general to drive the car, such implied consent being not limited to the persons of Alan Jones and Craig Lee McCracken. The contention that the summary judgment was improperly granted is based on the premise that the factual issue of the implied consent was material and unresolved at the time that the summary judgment was granted, therefore making that action improper.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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and

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May, 1978

Appendix A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 77-1855

FARMERS ALLIANCE MUTUAL INSURANCE COMPANY Plaintiff-Appellee, vs. ALAN JONES and CRAIG LEE McCRACKEN, Defendants-Appellants.	Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. 77-0138-B)

Submitted: January 23, 1978
on the briefs

Elliott C. Fenton and Larry D. Ottaway of Fenton, Fenton, Smith, Reneau and Moon, Oklahoma City, Oklahoma, for Appellee.

Charles B. Grethen and E. V. Spadafora, Purcell, Oklahoma, for Appellants.

Before SETH, Chief Judge, McWILLIAMS and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

Farmers Alliance Mutual Insurance Company (Farmers) brought this diversity-based action under the Declaratory Judgment Act, 28 U.S.C. § 2201 (the Act), to determine its liability under an automobile insurance policy issued to Spann Chevrolet Company (Company). The trial court granted Farmers' motion for summary judgment finding, as a matter of law, that Farmers was not liable on the policy in that the driver of a Company vehicle was not an insured under the Farmers' policy.

In August, 1975, Farmers, a Kansas corporation, issued a "General Automobile Liability Policy" to Company, an Oklahoma corporation, covering cars owned by Company. Under the terms of the policy, Farmers assumed liability for automobile accidents in which the named insured, any officer of the corporation or any one using an automobile owned by Company with appropriate permission were involved. Farmers also agreed to defend the insured in any automobile negligence action.

In May of 1976, a 1975 Camaro, driven by one E. L. Shippey, was involved in a one-car accident. Shippey was killed. The passengers, Melissa Spann, daughter of Orval Spann, vice-president of Company, and appellants, Alan Jones and Craig Lee McCracken, were injured. Melissa had been given express permission to drive the vehicle; however, Shippey had no such permission.

Subsequently, both Jones and McCracken filed negligence actions in the district court of Pontococ County, Oklahoma. Named as defendant in these actions was Sally Ann Shippey, administratrix of the driver's estate. Before the state actions were litigated, Farmers filed this

declaratory judgment action, naming Company, Orval Spann, Melissa Spann, Sally Ann Shippey and appellants Alan Jones and Craig Lee McCracken as defendants. Only Jones and McCracken appeal the adverse decision of the trial court.

On appeal, Jones and McCracken contend that: (1) the trial court had no jurisdiction under the Declaratory Judgment Act; (2) Orval Spann and Company should have been realigned as party plaintiffs, thereby destroying diversity; and (3) summary judgment was erroneously granted in that there was a genuine issue of material fact as to "implied permission" of Shippey to drive the Company vehicle.

I.

Jones and McCracken contend that Farmers should not have been able to maintain a declaratory judgment action in federal court inasmuch as a similar action for declaration of its rights could not have been brought in Oklahoma state courts.

Oklahoma's declaratory judgment act, 11 O.S. § 1651, expressly prohibits actions brought to determine liability of insurors. The federal Declaratory Judgment Act is much broader. It allows for entertainment of any "actual controversy within its jurisdiction." Appellants contend that this presents an issue of substantive law dictating application of the doctrine of Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), and its progeny. Under their theory of *Erie, supra,* appellants contend that inasmuch as Farmers is not permitted to bring a declaratory action in Oklahoma state courts, it should not be permitted to bring a similar action in federal court. We reject this contention.

It is well recognized that the Act involves procedural remedies and not substantive rights. 6A Moore's Federal Practice § 57-23, at 57-237; 20 Appleman's Insurance Law and Practice § 11332, at 102. The Act does not create substantive rights for parties; it merely provides another procedure whereby parties may obtain judicial relief. We have here, then, a procedural question dealing simply with a choice of forums.

There is, of course, a substantive question involved in the case which must be decided under Oklahoma law; i.e., whether the driver will be classed as an insured under the Farmers policy. The prohibition against declaratory judgments contained in the Oklahoma statute does not affect Farmers' suit in federal court.

Declaratory judgment actions are seen as useful in actions wherein insurance companies seek to have their liability declared. 20 Appleman's, § 11332, at 109. We have expressly recognized that one of the primary functions of the Act is to provide the insuror such a forum. Western Casualty and Surety Co. v. Teel, 391 F.2d 764 (10th Cir. 1968).

A trial court has discretion to determine whether to entertain a declaratory judgment action and the decision of the trial court will not be overturned unless there is a clear abuse of that discretion demonstrated. Duggins v. Hunt, 323 F.2d 748 (10th Cir. 1963). No such abuse occurred here.

II.

Jones and McCracken argue that no "actual controversy" exists between the plaintiff, Farmers, and defendants, Company and Orval Spann, inasmuch as all parties agree that Farmers is not liable to Jones and

McCracken. Appellants contend that because only a nominal controversy exists, the above-named defendants should have been realigned as party plaintiffs, with the resultant destruction of diversity of citizenship.

In diversity suits, courts will scrutinize the interests of the parties in order to determine if their positions as plaintiffs and defendants conform to their real interests. When appropriate, parties will be realigned; however, this is to be done only after real rather than apparent interests have been ascertained. 3A Moore's Federal Practice, 2nd ed., § 1093(1), at 2152. Facts which can be used for forming the determination that realignment is proper must have been in existence at the time the action was commenced. *See,* Universal Underwriters Insurance Co. v. Wagner, 367 F.2d 866 (10th Cir. 1966); Scott v. Fancher, 369 F.2d 842 (5th Cir. 1966); Texas Pacific Coal & Oil Co. v. Mayfield, 152 F.2d 956 (5th Cir. 1956). An action is deemed to commence at the time of filing of the complaint. Accordingly, we must examine the pleadings to determine if there was a justiciable controversy. Farmers, in its complaint, alleges that an actual controversy exists "involving the rights and liabilities under contract of liability and dependent upon the construction of said contract of liability insurance." In their answer, defendants Company and Orval Spann contend that Farmers should be required to provide *coverage* to Company to the extent of the policy limits and to *defend* Company in any action arising out of the May 1976 accident. These facts, as pleaded, reveal then that Farmers and Company recognized that their interests were adverse.

Appellants anchor their contention that there is no

actual controversy presented herein primarily on a statement made by Orval Spann, in a deposition taken after commencement of this action. Spann, in asserting that Shippey had no permission to drive the Camaro, remarked, "If I don't have any liability, then I'm sure that the insurance company doesn't have any liability."

Appellants rely heavily on Fireman's Fund Insurance Co. v. Dunlap, 317 F.2d 443 (4th Cir. 1963), wherein the court, in a diversity based declaratory judgment action, dismissed for want of an actual controversy after realigning the parties. In that case Firemans, as insuror, brought an action seeking a declaration of its liability. Fireman's alleged that it had no duty to defend or to pay a judgment because the requisite permission to use the automobile involved in an accident was not present. That case, wherein realignment was proper, can be readily distinguished from the case at bar. In *Fireman's Fund, supra,* the insured asserted, in defense, that he was not liable to parties who had been injured because the driver was using his vehicle without permission. The insured affirmatively asserted this defense in a cross-claim filed against the co-defendants, the administrators of estates of persons who had been killed when his vehicle struck them. Further, he actively cooperated with insurance investigators in order to establish the defense of lack of permission both for the company and himself. Under these circumstances, the court found that the insuror and insured did not have adverse interests. We have no argument with that decision.

The rule applied in *Firemans Fund, supra* does not fit the case at bar. The only proof presented by appellants that no adversity exists is contained in Spann's testimony.

However, there is no indication therein that Spann actively cooperated with Farmers or that Farmers would not defend Company in the state action. Spann's remarks, standing alone, are not supportive of the proposition that there is no actual controversy between the insuror and the insured.

In Till v. Hartford Accident & Indemnity Co., 124 F.2d 405 (10th Cir. 1941), we considered the issue of realignment in a declaratory judgment action filed by an insuror against an insured. We there determined that the parties' interests were adverse. That opinion controls here. In *Till, supra,* the insuror alleged that it had no duty to pay a judgment or to defend any action against the insured. The insured, by way of counterclaim, asserted that insuror was obligated to defend any action brought against insured and to pay any judgments resulting from such action. In its counterclaim, the insured agreed with insuror that the driver was using insured's car without permission. We there held that a justiciable controversy was presented:

> A declaratory judgment that the accident was not within the coverage of the policy would not relieve Hartford (insuror) from the duty of defending any actions pending or which might be brought against Small (insured). This, it will be seen that there was an actual controversy between Hartford and Small both as to the coverage of Woodward (driver of the car) as an insured and the obligation of Hartford to defend any actions brought against Small.
>
> 124 F.2d, at p. 405.

The rule applied in *Till, supra,* is applicable here. Farmers had agreed by the terms of its policy to defend and compensate Company, et al., in any actions arising out of

use of an insured vehicle. There is nothing in this record from which one could infer that Farmers refused to defend Company's interests. Absent any affirmative evidence indicating collusion between Farmers and Company, we hold that there did exist an actual controversy between Company and Farmers. The trial court did not err in refusing to realign Company and Orval Spann as party plaintiffs.

III.

Jones and McCracken contend that the grant of summary judgment in favor of Farmers was improper in that there was an unresolved factual issue bearing on whether Shippey had permission to drive the Company vehicle.

Fed. Rules Civ. Proc., rule 56, 28 U.S.C., allows for summary judgment when there is no genuine issue as to any material fact. Here, if there is any actual genuine factual dispute at issue, it is whether Shippey had either expressly or impliedly been granted permission to use the Company vehicle.

The import of ascertaining whether such permission existed is apparent. Under its policy terms with Company, Farmers assumed liability for accidents occurring while a Company vehicle was being used by any person who had permission of the named insured (Company). In Oklahoma, permission to use an automobile can be either express or implied. Oklahoma Farm Bureau Mutual Insurance Co. v. Bryant, 318 P.2d 430 (Okla. 1957); Carlton v. State Farm Mutual Automobile Insurance Co., 309 P.2d 286 (Okla. 1957).

Shippey did not have express permission to use the subject vehicle. It is undisputed that Melissa Spann had received express permission to use the automobile; however, no such authority had been granted to Shippey.

It is only in the area of implied permission, then, that some factual issue might arise. Factors which can be used to find implied affirmative consent are based on mutual acquiescence or course of conduct of the parties. Implied permission to use another's automobile is said to arise or:

> . . . may result by implication from the relationship of the parties and their course of conduct in which they mutually acquiesced. And it may arise from a course of conduct pursued with knowledge of the facts for such time and in such manner as to signify clearly and convincingly an understanding consent which amounts in law to a grant of the privilege involved.
>
> United States Automobile Association v. Preferred Accident Insurance Company of New York, 190 F.2d 404 (10th Cir. 1951).

Thus, if Jones and McCracken have presented evidence going to the proposition that permission should be implied as a result of conduct or acquiescence of Company, then the summary judgment in favor of Farmers should not have been granted.

There is, in this instance, no special kind of relationship between Company and Shippey which would result in drawing an inference that Shippey had permission to use the Company vehicle. There was, to the contrary, an animus between Spann and Shippey, for Shippey was Orval Spann's estranged son-in-law. Melissa Spann had been expressly instructed not to see Shippey. Even though

Melissa had permission to use the vehicles belonging to Company, this status did not vest in her the right to extend such permission to others. A parent-child relationship, standing alone, is not sufficient to support the inference that the child had authority to loan out the parent's vehicle. Western Casualty and Surety Co. v. Grice, 422 F.2d 926 (10th Cir. 1970).

Orval Spann and his wife, Wanda, adamantly deposed that they had expressly forbidden Melissa to allow anyone else to drive a vehicle entrusted to her. They further averred that they knew of no instance when she had disobeyed this order. Under Oklahoma law no permission will be implied if express prohibitions are issued and the owner has no reason to know that the vehicle was in fact being used by others. Oklahoma State Farm Mutual v. Bryant, *supra;* Carlton v. State Farm Mutual Insurance Co., *supra.* In applying Oklahoma law, we have held that the grant by a permissive user, in derogation of instructions not to permit another to use a vehicle, does not constitute implied permission. Samuels v. American Automobile Insurance Co., 150 F.2d 221 (10th Cir. 1945).

Jones and McCracken, by their respective affidavits, assert that Wanda Spann had knowledge that Melissa had, on occasion, allowed them to drive vehicles which she was permitted to use. They also assert that Wanda Spann consented to this use. However, nothing in this record evidences that Jones or McCracken had any knowledge that Shippey drove a Company vehicle with acquiescence in that use by the Spanns. Thus, these affidavits contain no information from which it can be inferred that Shippey had previously used a Company vehicle. This lack of facts

relating to use by Shippey, coupled with the assertion by Orval Spann that Melissa was directed not to see Shippey, do not support Jones and McCracken in their contention that there were unresolved factual issues. The trial court correctly granted summary judgment in favor of Farmers. In doing so, the court properly "pierced" the pleadings in finding from the complaint, answers, depositions and affidavits that no genuine issues of material facts exist. Ando v. Great Western Sugar Company, 475 F.2d 531 (10th Cir. 1973).

WE AFFIRM.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JANUARY TERM - FEBRUARY 22, 1978

Before The Honorable Oliver Seth, Circuit Judge,
The Honorable Robert H. McWilliams, Circuit Judge,
The Honorable James E. Barrett, Circuit Judge

FARMERS ALLIANCE MUTUAL INSURANCE COMPANY, a corporation Plaintiff-Appellee, vs. SPANN CHEVROLET COMPANY a corporation; ORVAL SPANN; SALLY ANN SHIPPEY, Administrator of the Estate of E. L. Shippey, Deceased; Melissa Spann; Defendants, and ALAN JONES and CRAIG LEE McCRACKEN, Defendants-Appellants.	)	JUDGMENT No. 77-1855 (D. C. No. 77-0138-B)

This cause came on for consideration on the record on appeal from the United States District Court for the Western District of Oklahoma and was submitted on the briefs at the direction of the court.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed

s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

FARMERS ALLIANCE MUTUAL INSURANCE COMPANY, a corporation, Plaintiff, vs. SPANN CHEVROLET COMPANY, a corporation; ORVAL SPANN; SALLY ANN SHIPPEY, Administratrix of the Estate of E. L. Shippey, deceased; ALAN JONES, CRAIG LEE McCRACKEN and MELISSA SPANN, Defendants.	)	NO. CIV-77-0138-B

JUDGMENT

This cause came before the Court on August 12, 1977 on plaintiff's Motion for Summary Judgment. Having carefully reviewed the entire record in this case, including

the pleadings, briefs and arguments of counsel, the Court has concluded that there is no genuine issue in this case as to any material fact and that the plaintiff is entitled to judgment in its favor as a matter of law pursuant to Rule 56, Federal Rules of Civil Procedure.

Plaintiff's claim for relief arises out of a declaratory judgment action filed to determine its obligations under a policy of garage liability insurance issued to defendant, Spann Chevrolet Company, as a result of an accident which occurred on May 20, 1976. This accident occurred when a vehicle owned by Spann Chevrolet Company and driven by E. L. Shippey, deceased, went off the roadway near Fittstown, Oklahoma. As a result of said accident defendants, Gary Lee McCracken and Alan Jones filed suit for personal injuries in the District Court of Ponotoc County, State of Oklahoma.

Plaintiff's policy of insurance extended coverage to the following persons:

"PERSONS INSURED

Each of the following is an insured under this insurance to the extent set forth below:

(a) the named insured;

(b) any partner or executive officer thereof, but with respect to a non-owned automobile only while such automobile is being used in the business of the named insured;

(c) Any other person while using an owned automobile or a hired automobile with the permission of the named insured; provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of

such permission, but with respect to bodily injury or property damage arising out of the loading or unloading thereof, such other person shall be an insured only if he is:

1. a lessee or borrower of the automobile.
or
2. an employee of the named insured or such lessee or borrower;

(d) any person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a), (b) or (c) above."

Based on the entire record, the Court concludes that E. L. Shippey was not an insured under any part above quoted portion of plaintiff's insurance contract.

In addition, a review of all of the evidence in this case discloses that, without dispute, E. L. Shippey, deceased, did not have the express permission of any named insured to operate the vehicle in question. It is urged that there was an implied permission. The Court concludes that the evidence, even viewed in a light most favorable to defendants, is insufficient to present a fact question on the issue of implied consent and that plaintiff is entitled to judgment thereon as a matter of law.

The uncontroverted facts clearly establish the absence of any liability on the part of the plaintiff, Farmers Alliance Mutual Insurance Company, for the alleged negligence of E. L. Shippey, deceased. An insurer is not obligated to defend a suit when it would not be liable under its insurance contract for any recovery had therein. *United States Fidelity and Guaranty Co. v. Reinhart*, 171 F.2d 681 (10th Cir. 1948). The insurance contract herein is unambiguous.

The facts clearly demonstrate that E. L. Shippey, deceased, was not an insured under the terms of plaintiff's policy. *Western Casualty and Surety Co. v. Grice,* 422 F.2d 921 (10th Cir. 1970); *Agee v. Travelers Indemnity Co.,* 396 F.2d 57 (10th Cir. 1968); *Duff v. Alliance Mutual Casualty Co.,* 296 F.2d 506 (10th Cir. 1961); *Carlton v. State Farm Mutual Auto Insurance Co.,* 309 P.2d 286 (Okl. 1957); *Oklahoma Farm Bureau Insurance Co. v. Bryant,* 318 P.2d 430 (Okl. 1957); *United Services Auto. Ass'n v. Preferred Accident Insurance Co. of N.Y.,* 190 F.2d 404 (10th Cir. 1951); *Samuels v. American Ins. Co.,* 150 F.2d 221 (10th Cir. 1945); among others.

Since E. L. Shippey, deceased, was not an insured under plaintiff's policy of insurance at the time of the accident involved herein, plaintiff is not obligated to defend actions brought against his Estate arising out of injuries allegedly sustained therein or pay any judgments rendered as a result thereof. Therefore, the Motion for Summary Judgment filed by plaintiff, Farmers Alliance Mutual Insurance Company, to that effect in its action seeking declaratory relief is sustained.

IT IS HEREBY ORDERED that, pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is granted in favor of plaintiff, Farmers Alliance Mutual Insurance Company, and against the defendants, Spann Chevrolet Company, Orval Spann, Sally Ann Shippey, Alan Jones, Craig Lee McCracken and Melissa Spann.

Dated this 25th day of August, 1977.

LUTHER BOHANON
UNITED STATES DISTRICT COURT

Appendix B

TITLE 28, UNITED STATES CODE

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be

deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico. As amended July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85—554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88—439, § 1, 78 Stat. 445.

Effective Date of 1964 Amendment. Section 2 of the Act provided: "The amendment made by this Act (adding proviso) to section 1332(c), title 28, United States Code, applies only to causes of action arising after the date of enactment of this Act."

SELECTED PROVISIONS

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. As amended May 24, 1949, c. 139 § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub.L. 85—508, § 12(p), 72 Stat. 349.

TITLE 12 OKLAHOMA STATUTES

CIVIL PROCEDURE

§ 1651. Determination of rights, status or other legal relations—Exceptions

District courts may, in cases of actual controversy, determine rights, status, or other legal relations, including but not limited to a determination of the construction or validity of any foreign judgment or decree, deed, contract, trust, or other instrument or agreement or of any statute, municipal ordinance, or other governmental regulation, whether or not other relief is or could be claimed, except that no such declaration shall be made concerning liability or nonliability for damages on account of alleged tortious injuries to persons or to property either before or after judgment or for compensation alleged to be due under workmen's compensation laws for injuries to persons or concerning obligations alleged to arise under policies of insurance covering liability or indemnity against liability for such injuries. The determination may be made either before or after there has been a breach of any legal duty or obligation, and it may be either affirmative or negative in form and effect; provided however, that a court may refuse to make such determination where the judgment, if rendered, would not terminate the controversy, or some part thereof, giving rise to the proceeding.

Laws 1961, p. 58, § 1, eff. Oct. 1, 1961. Amended by Laws 1974, c. 134, § 1, emerg. eff. May 3, 1974.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1646

ALAN JONES and CRAIG LEE McCRACKEN,
Petitioners,

VERSUS

FARMERS ALLIANCE MUTUAL INSURANCE COMPANY, a corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

ELLIOTT C. FENTON and
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June, 1978

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

OPINION BELOW

The opinion of the Court below in *Farmers Alliance Mutual Insurance Company* v. *Jones, et al.*, is now reported at 570 F.2d 1384 (10th Cir. 1978), and is appended to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

A brief clarification of Petitioners' factual statement is required to properly frame the issues presented to this Court. The parties will be referred to as they appeared in the Trial Court.

Plaintiff, Farmers Alliance Mutual Insurance Company (hereinafter Farmers), issued a "General Automobile Liability Policy" to Spann Chevrolet Company which was in effect at all times relevant to this action. The relevant portion of the policy provided:

"PERSONS INSURED

Each of the following is an insured under this insurance to the extent set forth below:

* * * * * *

(c) Any other person while using an owned automobile . . . with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use is within the scope of such permission, ..."

On May 20, 1976, a vehicle owned by Spann Chevrolet Company was involved in a one-car accident in Pontotoc County, Oklahoma. At the time of the accident, the vehicle was being driven by E. L. Shippey who died in the collision. Defendants, Melissa Spann, Alan Jones and Craig Lee McCracken were passengers.

This vehicle had been furnished to Wanda Spann, wife of the owner of Spann Chevrolet, several months prior to the accident. Melissa Spann, daughter of the owner of Spann Chevrolet, was occasionally permitted to operate the vehicle under specific instructions not to let third parties (particularly E. L. Shippey) drive.

Defendants, Alan Jones and Craig Lee McCracken, instituted actions against the Estate of E. L. Shippey in State Court for injuries allegedly received in the collision. Farmers Alliance Mutual Insurance Company then initiated

a declaratory judgment action pursuant to 28 U.S.C. § 2201 *et seq.* naming Spann Chevrolet Company, its owner Orval Spann, the Estate of E. L. Shippey and the passengers in the vehicle at the time of the accident as defendants. Jurisdiction was established by diversity of citizenship and requisite amount in controversy under 28 U.S.C. § 1332. After extensive discovery, Farmers filed its Motion for Summary Judgment which was sustained by the Trial Court. Defendants, Jones and McCracken, appealed. The judgment entered by the Trial Court was unanimously affirmed by the United States Tenth Circuit Court of Appeals.

REASONS FOR NOT GRANTING PETITIONERS' WRIT OF CERTIORARI

Petitioners, Jones and McCracken, assert that review should be granted under Rule 19(1)(b) of the Supreme Court Rules which provides review may be granted:

"(b) Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals *on the same matter*; . . . ." [Emphasis ours]

Such is not the case herein.

The Federal Declaratory Judgment Act, like its Oklahoma counterpart, is a *procedural* remedy. *Stamicarbon N. V.* v. *Chemical Const. Corp.*, 335 F.Supp. 228 (D.C. Del. 1973). Where federal jurisdictional requirements are present (in this case by reason of diversity of citizenship), the exercise of jurisdiction under the Federal Declaratory Judgment Act is discretionary. *Duggins* v. *Hunt*, 323 F.2d

746 (10th Cir. 1963). The exercise of that discretion in cases requesting a declaration of coverage under a policy of liability insurance has been repeatedly affirmed by the United States Court of Appeals, Tenth Circuit. *State Farm Mutual Auto Ins. Co.* v. *Mid-Continent Casualty Co.*, 518 F.2d 292 (10th Cir. 1975); *Allstate Insurance Co.* v. *Hiseley*, 465 F.2d 1243 (10th Cir. 1972).

Petitioners rely upon *Allstate Insurance Company* v. *Charneski*, 286 F.2d 238 (7th Cir. 1960), to support their contention that 12 O.S., § 1651, an Oklahoma Statute prohibiting declaratory actions in State Courts on policies of liability insurance, effectively precludes determination of such cases filed pursuant to 28 U.S.C. § 2201 *et seq.* in Federal Courts sitting in Oklahoma because: (1) The State Statute is substantive in nature and thereby controls under *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938); and (2) Any exercise of discretion under the Federal Declaratory Judgment Act would be improper in light of the Oklahoma Statute which precludes such declaratory actions in State Courts.

Oklahoma has not adopted by the passage of 12 O.S. § 1651 a policy against deciding coverage questions. It has merely restricted the *procedural* remedy available in *State* Courts thereby requiring determination of those issues in post-judgment garnishment actions. It cannot be successfully contended that the Oklahoma Legislature can similarly restrict the jurisdiction of United States District Courts where federal jurisdictional requirements are present. The *substantive* question (the status of E. L. Shippey

under the Farmers' policy) was decided under applicable Oklahoma law in favor of Farmers.

Allstate v. *Charneski*, supra, arises out of Wisconsin. That State permits direct actions against carriers. Thus, coverage and liability issues are determined in one action. Any discretionary exercise of jurisdiction under the Federal Declaratory Judgment Act would, therefore, necessitate two trials in place of one.

This is not the situation in Oklahoma since direct actions against carriers are not permitted in this State. Coverage questions must, therefore, be determined in separate suits. Thus, the determination of coverage questions under the Federal Declaratory Judgment Act has been held a proper exercise of discretion in this jurisdiction. *Western Casualty and Surety Co.* v. *Teel*, 391 F.2d 765 (10th Cir. 1968).

The case relied upon by Petitioners is not, therefore, "a decision which conflicts with the decision of another Court of Appeals *on the same matter*" as required by Rule 19(1)(b) of the United States Supreme Court Rules and is not grounds for review by this Court on a Petition for Writ of Certiorari.

Petitioners rely upon *Fireman's Fund Insurance Company* v. *Dunlap*, 317 F.2d 443 (4th Cir. 1963), to support their contention that the insured (in this case Spann Chevrolet Company, an Oklahoma corporation) should be realigned as a party plaintiff thereby defeating diversity of citizenship.

In that case, the injured plaintiff asserted in the pending liability action that the driver was operating the vehicle with the permission of the named insured. The named insured filed a cross-claim for declaratory relief as to non-liability in response to that contention.

Neither situation exists in this action. Defendant Spann Chevrolet Company claimed coverage in its answer to Farmers' declaratory judgment action. The insured need not be adverse to its insurer of every point. If any point of controversy exists, realignment is inappropriate. *Sutton* v. *English*, 246 U.S. 199, 38 S.Ct. 254 (1968).

Till v. *Hartford Accident & Indemnity Co.*, 124 F.2d 405 (10th Cir. 1941), a case arising out of Oklahoma and involving facts identical to this action, addressed the realignment issues as follows:

"The appellants assert that Small should be arraigned as a party plaintiff; that when she is so arraigned diversity of citizenship does not exist; and that the trial court was without jurisdiction. . . .

* * * * * *

"Here Hartford and Small were mutually interested in obtaining a declaratory judgment to the effect that Woodward at the time of the accident was not operating the automobile for and on behalf of Small nor with her consent. . . .

* * * * * *

". . . A declaratory judgment that the accident was not within the coverage of the policy would not relieve Hartford from the duty of defending any actions pending or which might be brought against Small. Thus, it will be seen that there was an actual controversy

between Hartford and Small both as to coverage of Woodward as an insured and the obligation of Hartford to defend any action brought against Small [citation omitted]. *We conclude that Small was properly aligned as a party defendant and that the requisite diversity of citizenship existed.*" [Emphasis ours]

As with Petitioners' previous contention the case relied upon to support their realignment argument involves facts which are different from those present herein. It is, therefore, not "a decision in conflict with a decision of another court *on the same matter*" and is not a reason for review by this Court on Petition for Writ of Certiorari.

Petitioners finally question the entry of summary judgment by the Trial Court and the affirmance of that judgment by the Tenth Circuit Court of Appeals. No Supreme Court rule is cited in support of Petitioners' claim that this decision should be tested by Writ of Certiorari. It is difficult to imagine any persuasive argument in favor of such a review in light of the fact that the Trial Court found the uncontroverted facts supported judgment for Farmers as a matter of law and that decision was unanimously affirmed by a panel of Judges from the United States Tenth Circuit Court of Appeals.

CONCLUSION

The Petition for Writ of Certiorari should be denied. Petitioners' contention that the decision rendered in this case is in conflict with decisions rendered "on the same matter" in other circuits is without merit. The cases relied upon by Petitioners in support of that claim involve different legal and factual considerations when compared to the instant controversy. The law as it relates to this case is well settled by previous decisions of the United States Tenth Circuit Court of Appeals. Petitioners should not be permitted to further test the propriety of summary judgment. Their evidence was presented to the Trial Court and found lacking as a matter of law. The decision of the Trial Court was tested on appeal and unanimously affirmed. No further review should be permitted.

Respectfully submitted,

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Attorneys for Respondent,
Farmers Alliance Mutual Insurance Company

June, 1978

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, was mailed on this 13th day of June, 1978, by depositing same in the United States Mails, postage prepaid, to:

Thomas G. Smith
P. O. Box 146
Purcell, Oklahoma 73080
Attorney for Petitioners

Charles B. Grethen
Attorney-at-Law
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Purcell, Oklahoma 73080

Larry D. Ottaway

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1646

ALAN JONES and CRAIG LEE McCRACKEN,
Petitioners,

VERSUS

FARMERS ALLIANCE MUTUAL INSURANCE COMPANY, a corporation,
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RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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July, 1978

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RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

OPINION BELOW

The opinion of the Court below in Farmer's Alliance Mutual Insurance Company v. Jones, et al., is reported at 570 F.2d 1384 (10th Cir. 1978), and is appended to the Petition for Writ of Certiorari.

STATUTES INVOLVED

The statues involved are 47 O.S. 7-324 (f) and 47 O.S. 7-601 which are set out verbatim and printed in Appendix A hereto.

STATEMENT OF THE CASE

Petitioner's factual statement of the case is contained in the Petition for Writ of Certiorari.

REASONS FOR GRANTING THIS WRIT

This Writ should be allowed for the reason that the opinion delivered by the Circuit Court of Appeals in this case is in conflict with the decision of at least one other Court of Appeals on two of the issues presented by the case. This is a proper ground for review as stated by the Supreme Court in Rule 19 (1)(b) of the Supreme Court Rules, which provides that review may be granted:

> "(b) Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter."

The decision of the 10th Circuit Court of Appeals in this case is in direct conflict with the decision of the Court of Appeals for the 7th Circuit in the case of *Allstate Insurance Co. v. Charneski,* 286 F.2d 238 (7th Cir. 1960). Respondent in their Brief in Opposition to the Petition for Certiorari sought to distinguish the decision of the Court in the *Charneski* case. The Respondent in so doing ignored the basis for the decision relied upon by the Court in the *Charneski* case. The Court in *Charneski* refused to allow a federal declaratory judgment action where the same was denied by state laws and where jurisdiction of the Federal Court was sought to be invoked by diversity of citizenship. In *Charneski* at page 243, the Court states:

> "The essence of diversity jurisdiction is that a Federal Court enforces state law and state policy."

The Court at page 244 states:

> "Federal interest to be served here is slight."

These statements by the Court indicate that the basis for their decision was respect for a state policy against the type of relief being sought in Federal Court which was specifically denied in state court. Respondents in the present case attempt to gain in Federal Court what is specifically denied in state court by the statutes of the State of Oklahoma. The Oklahoma Statute denying the respondent the right to bring a declaratory judgment action to determine coverage under an insurance policy until the issue of liability has been decided is demonstrative of Oklahoma's state policy against the same.

The Circuit Court of Appeals for the 4th Circuit has also considered this issue in the case of *American Fidelity & Casualty Company v. Service Oil Company,* 164 F.2d 478 (4th Cir. 1947). In discussing an application for a federal declaratory judgment action where the case was pending before the state courts, the Court of Appeals for the 4th Circuit stated:

> "There could be no possible justification for dragging into the Federal Court the litigation of issues pending in the state court for the sake of obtaining a declaratory judgment as to a matter that will have no practical significance if the defendants prevail in the state court, and which the company can litigate as well after the termination of the state court litigation is now if the defendants do not prevail."

The exact action which was condemned by this decision of the 4th Circuit was permitted by the 10th Circuit in the present case and, therefore, the action of the 10th Circuit is in direct conflict with the decision of the 4th Circuit in the *Service Oil Company* case.

In summary, it appears that there is no strong federal

interest in maintaining this type of declaratory judgment action while the State of Okiahoma has a state policy against the maintenance of such an action prior to the adjudication of liability in a tort action. It then follows that the Federal District Court should have honored this state policy and declined to hear this declaratory judgment action.

The decision of the Court of Appeals in this case is in conflict with the decision of the Court of Appeals for the 4th Circuit in the *Fireman's Fund Insurance Co. v. Dunlap,* 317 F.2d 443 (4th Cir. 1963). In the *Fireman's Fund* case the insured, under an insurance policy whose terms were identical to those involved in this action, agreed with the insurer on the issues of whether the driver of the insured's automobile had the insured's consent and whether the driver was covered by the insurance policy. The insured in that case cooperated with the insurer in investigating and defending the claim. The facts of the case at hand are comparable to the facts of the *Fireman's Fund* case. The insured here, Spann Chevrolet Company, through its officer, Orval Spann, agreed with the insurer on the issue of consent, and on the issue of coverage by the insurance policy, as is demonstrated by his statement which he gave to the insurance company subsequent to the accident. Orval Spann also cooperated with the insurer by giving his statement immediately after the accident, expressing in the statement that E. L. Shippey did not have permission to drive the automobile, and that neither he nor the insurer, Farmers Alliance, should be responsible or liable for the accident. The 4th Circuit in the *Fireman's Fund* case held that the agreement as to the permission destroyed the only actual controversy that existed between the insurer and

insured. The 4th Circuit further determined that the insurer's allegation of controversy between itself and its insurer because of the insurer's duty to defend the lawsuit was only nominal and without merit due to the expressed terms of the contract itself. By analogy, it can be concluded that if the 4th Circuit had heard the present case, it would have determined that there was no controversy between Spann Chevrolet Co. and Farmer's Alliance and would have realigned Spann Chevrolet Co. as party plaintiff, thereby destroying diversity of citizenship and depriving the Federal Courts of jurisdiction.

The case of *Till v. Hartford Accident and Indemnity Company,* 124 F.2d 405 (4th Cir. 1941), cited by the Respondent further demonstrates that decisions of the 10th Circuit and the 4th Circuit are in conflict on this issue, thereby establishing grounds upon which this review may be granted.

The granting of the summary judgment by the District Court was improper for several reasons. Petitioners alleged and presented evidence to the effect that Wanda C. Spann, an insured under the insurance policy, had pursued a course of conduct which demonstrated her implied consent to third parties driving the automobile given to Melissa Spann for her use. This implied consent by Wanda C. Spann brought any third party driving the vehicle within the coverage of the insurance policy in question.

Respondent relied on the statements of its insureds to defeat coverage under the insurance policy. This action by the respondent was contra to state policy as demonstrated by Oklahoma Law. 47 O.S. § 7-324 (f)(1) in reference to provisions incorporated in motor vehicle liability policies states:

"1. The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be cancelled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury to damage; NO STATEMENT MADE BY THE INSURED OR ON HIS BEHALF AND NO VIOLATION OF SAID POLICY SHALL DEFEAT OR VOID SAID POLICY." (Emphasis ours)

Without the statement of its insured, Farmers Alliance had no basis upon which to deny liability under the policy, and the issue of implied consent remained undecided.

The matter of implied consent was a material fact concerning which there was a genuine controversy which had not been resolved. Under Rule 56(c) of the Federal Rules of Civil Procedure, a summary judgment should not be granted unless it is shown that there is no genuine issue as to any material fact. Respondents failed to meet this burden, and, therefore, were not entitled to the summary judgment.

The automobile accident in question occurred on May 20, 1976, in which Alan Jones and Craig Lee McCracken were severely injured. At that particular time, the Oklahoma legislature was in the process of passing an act known as compulsory automobile liability insurance requiring owners of motor vehicles registered in the state to maintain at all times security at not less than the limits of liability required under the Financial Responsibility Law of the State of Oklahoma. This Act was approved June 1, 1976, and was to become operative December 11, 1976.

The Act is 47 O.S. § 7-601 and provides in part as follows:

"Every owner of a motor vehicle registered in this state, other than a licensed used car dealer, shall, at all times, maintain in force with respect to such vehicle security for the payment of loss resulting from the liability imposed by law for bodily injury, death and property damage sustained by any person arising out of the ownership, maintenance, operation, or use of the vehicle.***"

The appellants would argue that as a matter of legislative policy and social justice, the Oklahoma Legislature in deliberating at the time of the accident approved on June 1, 1976, with an effective date of December 11, 1976, was expressing a policy of social justice that, when persons are injured as a result of the ownership, maintenance, operation or use of a motor vehicle, security in the form of an insurance policy, cash, securities or self-insurance would be available to pay for the damages resulting therefrom. What the appellee has attempted to do is to circumvent the law by declaring non-liability on the policy without a determination in the state court whether liability for damages will be imposed as a result of the operation or use of the vehicle.

CONCLUSION

The Petition for the Writ of Certiorari should be granted. The decision rendered in this case is in conflict with the decisions rendered on the same issues by the Courts of Appeals for the 4th Circuit and 7th Circuit. The evidence presented to the trial court was not decisive as to the material issues and, therefore, was not a sufficient ground for a summary judgment. The insurance company herein

was allowed to avoid the operation of Oklahoma state policy by the prior decisions of the District and Circuit Court, therefore, petitioners pray that the decision of the trial court and the Circuit Court of Appeals for the 10th Circuit be reviewed by this Honorable Court and reversed.

Respectfully submitted,

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and

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July, 1978

APPENDIX A

47 O.S. § 7-324 (f):

(f) Provisions incorporated in policy. Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

1. The liability of the insurance carrier with respect to the insurance required by this chapter shall become abolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be cancelled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy.

2. The satisfaction by the insured of a judgment for such injury or damage shall not be a condition precedent to the right or duty of the insurance carrier to make payment on account of such injury or damage.

3. The insurance carrier shall have the right to settle any claim covered by the policy, and if such settlement is made in good faith, the amount thereof shall be deductible from the limits of liability specified in subdivision 2 of subsection (b) of this section.

4. The policy, the written application therefor,if any, and any rider or endorsement which does not conflict with the provisions of this chapter shall constitute the entire contract-between the parties.

47 O.S. § 7-601. Limits of liability requirement

Every owner of a motor vehicle registered in this state, other than a licensed used car dealer, shall, at all times, maintain in force with respect to such vehicle security for the payment of loss resulting from the liability imposed by law for bodily injury, death and property damage sustained by any person arising out of the ownership, maintenance, operation or use of the vehicle. As used herein, "security" means:

1. A policy or bond meeting the requirements of Section 7—204 of this title;

2. A deposit of cash or securities having the equivalency of limits required under Section 7—204 of this title as acceptable limits for a policy or bond; or

3. Self-insurance, pursuant to the provisions of Section 7—503 of this title, having the equivalency of limits required under Section 7—204 of this title as acceptable limits for a policy or bond.

Added by Laws 1976, c. 176, § 1, operative Dec. 11, 1976.

Sections 7, 8 and 9, of Laws 1976, c. 176, provided for codification of § § 7—601 to 7—606, a general repealer of conflicting laws, and an operative date of December 11, 1976.

Title of Act:

An Act relating to motor vehicles; providing for compulsory automobile liability insurance; requiring owners of motor vehicles registered in the state to maintain at all times security at not less than the limits of liability required under the Financial Responsibility Law; providing for certification of security by such owners at the time of registration of the vehicles; providing for verification of security; providing for the sending of copies of notices of cancellation to the Motor Vehicle Department; providing for suspension of driver's licenses and vehicle registrations for failure to maintain such security; providing for a fine as an

additional penalty for failure to maintain such security; directing codification; repealing conflicting laws; and providing an operative date. Laws 1976, c. 176.

1. Construction and application

It is mandatory that a motor vehicle liability insurance policy issued on a motorcycle registered in the State of Oklahoma provide guest passenger personal insurance coverage. Op.Atty.Gen. No. 77-200 (July 27, 1977).

An individual who makes a false certification of the existence of security as required by 47 Okl.St.Ann § 7—602 is subject to a charge of perjury under the provisions of 21 Okl.St.Ann. § 491 and upon conviction thereof, subject to penalty as provided in 21 Okl.St.Ann § 500. Op.Atty.Gen. No. 76—389 (Jan. 25, 1977).

It is not a necessary element for a charge of perjury that penalty first have been imposed under provision of 47 Okl.St.Ann § § 7—605 and 7—606. Id.

An adjudication of guilt of a violation of the provisions of this section would not preclude the filing of charges under 21 Okl.St.Ann # 491, or vice versa, inasmuch as the elements of the crimes established in the two sections under consideration are separate and distinct. Id.

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REPLY TO PETITIONERS' RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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STATEMENT OF THE CASE

A complete statement of the case is contained in Respondent's Brief in Opposition to Petition for Writ of Certiorari filed herein on June 15, 1978.

REASONS FOR NOT GRANTING PETITIONERS' WRIT OF CERTIORARI

This Brief has been required by the Petitioners filing of a responsive pleading to Respondent's Brief in Opposition to Petition for Writ of Certiorari. In their Brief, Petitioners cite *for the first time* certain authorities, which they contend support their request for writ of certiorari. This Brief will be limited to a review of those authorities.

American Fidelity & Casualty Co. v. *Service Oil Co., Inc.*, 164 F.2d 478 (4th Cir. 1947), cited by Petitioners is not applicable to this case. There, the carrier raised as the issue to be decided in the declaratory judgment suit the identical issue to be decided in the pending State Court action.

> "Counsel for the company . . . have prepared answers for filing in the state court which deny liability on the part of the insured on the same principal ground asserted by the company in the suit for declaratory relief. . . ." 164 F.2d 478 at 479.

In the case now before this Court, the status of Mr. Shippey as a permissive user was not an issue in the action pending against his estate in State Court. The federal declaratory judgment procedure used by Respondent to adjudicate the status of Mr. Shippey under plaintiff's policy with Spann Chevrolet, therefore, did *not* require two suits to decide what would have been decided in one suit as the case in all of the opinions relied upon by Petitioners. There is no conflict among the circuits on this point and no reason for certiorari.

Petitioners now argue that 47 O.S. § 7-324(f)(1) and 47 O.S. § 7-601 mandate reconsideration. These statutes were *not* cited by Petitioners before the Trial Court, the Tenth Circuit Court of Appeals or in their Petition for Writ of Certiorari before this Court. It is difficult to understand how Petitioners can request this Court grant certiorari on authorities never presented to or on issues not decided by the Trial Court or the Tenth Circuit Court of Appeals. Even if Petitioners' contentions were well taken, they have been waived by failure to previously assert them. *Namet* v.

U. S., 373 U.S. 179, 83 S.Ct. 1151 (1963). However, Respondent feels obligated to answer these assertions since they are not valid.

47 O.S. § 7-324(f)(1) provides:

> "1. The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage *covered by said motor vehicle liability policy occurs;* said policy may not be cancelled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury to damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy." [Emphasis ours]

In this case, a determination has been made that the injury complained of was *not* covered by Respondent's policy. Further, it was *not* a statement by the insured which defeated coverage. It was the fact that the driver of the vehicle at the time of the accident was not a permissive user under the terms of the "Persons Insured" section of the policy involved. Coverage was not defeated or voided by any statement of the insured. Respondent's policy simply provided no coverage for Mr. Shippey at the time of the accident because of his status as a nonpermissive user. The statute relied upon was designed to prevent carriers from denying coverage *as a result* of statements made by an insured after an accident, *i.e.*, admissions of liability which might be asserted as a breach of duty to cooperate under the policy. The statute does not prevent an insured from testifying to facts surrounding the use or misuse of the vehicle.

Finally, Petitioners argue that Oklahoma has adopted by passage of 47 O.S. § 7-601 a policy of requiring mandatory insurance which prevents carriers from denying coverage in all situations. The statute upon which Petitioners rely became effective over six (6) months *after* the date of the accident involved herein. Further, policies excluding coverage for nonpermissive use are approved by this State and such restrictions do not conflict with the definition of a policy contained in subpart (1) of § 7-601. This statute is not designed to create coverage where it does not exist under the provisions of the policy itself.

CONCLUSION

Petitioners' request for writ of certiorari should be denied.

Respectfully submitted,

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August, 1978

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing REPLY TO PETITIONERS' RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT was mailed on this 21st day of August, 1978, by depositing same in the United States Mails, postage prepaid, to:

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